

ITEM: 19

SUBJECT: City of Live Oak, Wastewater Treatment Plant, Sutter County

BOARD ACTION: *Consideration of a Cease and Desist Order*

BACKGROUND: The City of Live Oak (Discharger) owns and operates a municipal wastewater treatment plant (WWTP) that serves its small community of 7500 people. The existing secondary pond treatment facility discharges up to 1.4 million gallons per day of secondary-treated wastewater to Reclamation District 777 Lateral Drain No. 1, tributary to the Main Canal and the Sutter Bypass.

The discharge is currently regulated by existing Waste Discharge Requirements (WDR) No. R5-2004-0096 and Cease and Desist Order (CDO) No. R5-2004-0097. The existing WDR and CDO contain time schedules for compliance with final effluent limitations for aluminum, ammonia, BOD, coliform, copper, cyanide, total suspended solids, turbidity and diazinon by 1 April 2009. The tentative CDO proposes to: (1) replace the existing CDO, (2) extend existing compliance dates up to May 2013 to accommodate local regionalization planning and funding efforts currently being conducted with the City of Yuba City and other neighboring communities, and (3) add interim performance-based effluent limitations. Regardless of the proposed compliance schedule extension, exemption from Mandatory Minimum Penalties (MMPs) for non-compliance with the subject final effluent limitations will expire in April 2009, or when the new CDO is issued, whichever is sooner.

The City of Live Oak's planning efforts will assist the City to decide whether to upgrade its existing secondary treatment system to a tertiary facility or to transport its wastewater to the nearby City of Yuba City WWTP for treatment and disposal (and cease existing surface water discharge). The existing residential sewer fees are \$47.00 per month. A proposed onsite tertiary plant upgrade is estimated to ultimately raise monthly sewer rates to \$84.00 per month. Similarly, potential regionalization is estimated to ultimately raise the monthly rates from \$75 to \$110.

ISSUES: Public comments regarding the tentative CDO were received by the Discharger and Mr. Ken Berry. Regional Water Board staff has addressed the Discharger's concerns; therefore, the Discharger is not contesting this item. Mr. Berry's comments were received late. However, since the comments claim that the proposed CDO violates the California Environmental Quality Act (CEQA) and 14 CCR section 15300, staff is providing a brief explanation of why the proposed CDO complies with CEQA.

First, the CDO does not modify any requirements in the Discharger's NPDES permit, but is merely intended to obtain compliance with those requirements. The CDO is therefore exempt from CEQA under Water Code Section 13389, since this order serves to implement a NPDES permit. (*Pacific Water Conditioning Ass'n, Inc. v. City Council of City of Riverside* (1977) 140 Cal.Rptr. 812, 73 Cal.App.3d 546, 555-556.) Section 13389 is not subject to the "Cortese List" exception that Mr. Berry cites.

Second, adoption of the CDO is not subject to CEQA because the CDO does not have the potential to cause a significant impact on the environment (Title 14 CCR section 15061(b)(3)) as it is intended to enforce preexisting requirements to improve the quality of ongoing discharges that are part of the CEQA "baseline." Any plant upgrades or replacement are the result of WDRs Order No. R5-2004-0096 and not this CDO.

Third, the Cortese List law specified in Government Code section 65962.5(c)(3), which requires the State Water Resources Control Board to compile a list of "[a]ll cease and desist orders issued after January 1, 1986, pursuant to Section 13301 of the Water Code..., that concern the discharge of wastes that are hazardous materials," was not intended to apply to the discharge of domestic sewage from publicly owned wastewater treatment facilities. Instead, the intent of the law was to provide notice to land use developers regarding the presence of hazardous materials that had been released on the property proposed for development.

This legislative intent is shown in part by where the Legislature placed section 65962.5 in the Government Code: Title 7 (Planning and Land Use), Division 1 (Planning and Zoning), Chapter 4.5 (Review and Approval of Development Projects), and Article 6 (Development Permits for Classes of Projects). All of these sections of the Government Code concern planning and land use development.

Section 65962.5, subdivision (f), supports this legislative intent. This subdivision requires lead agencies to determine whether an application for a "development project" deals with a Cortese List site. If so, the lead agency must notify the applicant of the presence of "hazardous waste and substances." The codified legislative history states that "this chapter applies to the making of a *land use decision* or the issuance of a *permit* for a hazardous waste facility *project* by a public agency..." (Gov. Code § 65963.1, subd. (a) (emphasis added).)

Chapter 4.5 deals only with "development projects." Although in some cases *new* waste discharge requirements may be "permits" for "development projects," a cease and desist order is not.

“‘Development project’ includes a project involving the issuance of a permit for construction or reconstruction but not a permit to operate.” (Ca. Gov. Code § 65928.) A project is an entitlement for use. (Ca. Gov. Code § 65931.) A cease and desist order is neither a permit to operate nor an entitlement for use, but an order to comply with existing requirements. (See, *People v. Library Once, Inc.* (1991) 229 Cal. App. 3d 973, 987 n.5.)

Fourth, the definition of “hazardous materials” in Health and Safety Code section 25501(o) was not intended to include domestic sewage.

These statutory provisions make clear that the Cortese List law was part of a comprehensive scheme relating to planning and land use development, and that its purpose was to provide information to developers regarding the presence of hazardous materials on the property considered for development. It was not intended to apply to waste discharges from WWTPs regulated by the State and Regional Water Boards, or to related CDOs.

Nor does it make any sense that the first CDO issued for a site could be subject to a categorical exemption, but any modifications to that same CDO would require the Regional Water Board to undertake a CEQA analysis that, in the commenter’s view, would have to include the original, clearly exempt CDO. The Legislature is presumed not to have intended absurd results. In addition to ignoring the CEQA baseline, this illogical result supports the conclusion that the Legislature did not intend the Cortese List exception to apply in this situation.

Mgmt. Review _____
Legal Review _____

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